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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Constitutional Provisions, Statutes and Regulations Involved 4

Statement of the Case 9

Proceedings Below 11

Summary of Argument 17

I. An intervening change in the law which would require petitioner's acquittal having occurred after affirmance of petitioner's conviction, and while certiorari was pending, the Court below erred in denying post-conviction relief under 28 U.S.C. §2255 19

1. Although the Ninth Circuit panel which decided *Davis III* inexplicably refused to acknowledge the change, the Ninth Circuit's decision in *United States* v. *Fox,* 454 F.2d 593 (1971), unmistakably effected a change in the law, which, had it existed at the time of *Davis II,* would have resulted in petitioner's acquittal 19

PAGE

2. The decisions of this Court in *Kaufman* v. *United States*, 394 U.S. 217 (1969), and *Sanders* v. *United States*, 373 U.S. 1 (1963), expressly authorize post-conviction relief where there has been an intervening change in the law, after appellate affirmance of a conviction 22

3. Post-conviction relief is compelled in this case because the intervening change in the law must be retroactively applied 32

4. In any event, post-conviction relief should have been granted in this case in the interest of justice 35

II. The decision below should be reversed and the judgment of conviction vacated, because petitioner's conviction for induction refusal, factually identical with that of appellant in *United States* v. *Fox*, 454 F.2d 593 (1973), was predicated on an invalid, delinquency-based induction order in conflict with the teaching of *Gutknecht* v. *United States*, 396 U.S. 295 (1970) 38

CONCLUSION 49

Table of Authorities

PAGE

Cases:

Akeson v. United States, 4 SSLR 3430 (D. Colo. 1970) 46
Alford v. North Carolina, 405 F.2d 340 (1969) 25, 26
Andre v. Resor, 443 F.2d 921 (1971), *aff'g* 313 F. Supp. 957 (N.D. Cal. 1970) 46

Battiste v. United States, 428 F.2d 801 (5th Cir. 1970) 41, 42, 43, 46
Bradley v. Laird, 449 F.2d 898 (10th Cir. 1971) 46
Braniff Airways Inc. v. Curtiss-Wright Corp., 424 F.2d 427 (2d Cir. 1970) 15
Breen v. Selective Service Local Board, 396 U.S. 460 (1970) 38
Brough v. United States, 454 F.2d 370 (7th Cir. 1970) 31, 34, 35
Bruce v. United States, 448 F.2d 21 (4th Cir. 1971) 46
Bucher v. Selective Service System, Local Boards No. 2 etc., 421 F.2d 24 (3d Cir. 1970) 38

Chandler v. United States, 332 F. Supp. 397 (D. Md. 1971) 46
Clay v. United States, 403 U.S. 698 (1971) 41

Davis v. Balkcom, 369 U.S. 811 (1962) 15

Escobedo v. United States, 350 F. Supp. 894 (N.D. Ill. 1972) 34
Etcheverry v. United States, 320 F.2d 873 (1963) 21

Fay v. Noia, 372 U.S. 339 (1963) 20, 36
Fiano v. United States, 291 F.2d 113 (1961) 28

PAGE

Foster v. United States, 320 F. Supp. 646 (D. Conn. 1970) 46

Gray v. United States, 407 F.2d 831 (5th Cir. 1969) 26, 34
Greene v. McElroy, 360 U.S. 474 (1959) 41
Gutknecht v. United States, 396 U.S. 295 (1970) .....*passim*

Hill v. United States, 368 U.S. 424 (1962) 26
Hodges v. United States, 282 F.2d 858 (D.C. Cir. 1960) 31
Huddleston v. Dwyer, 322 U.S. 232 (1944) 15

Isaac v. United States, 293 F. Supp. 1096 (D.S.C. 1968) 26

Jack v. United States, 435 F.2d 317 (9th Cir. 1970) 27, 28

Kaufman v. United States, 394 U.S. 217 (1969) .....*passim*
Kittrell v. United States, 4 SSLR 3439 (N.D. Fla. 1971) 46

Larson v. United States, 275 F.2d 673 (5th Cir. 1960) .. 32
Leary v. United States, 395 U.S. 6 (1969) 37
Linkletter v. Walker, 381 U.S. 618 (1965) 33

Meehan v. Macy, 425 F.2d 469 (D.C. Cir. 1968) 15
Mikesell v. United States, 3 SSLR 3390 (W.D. Mich. 1970) 46
Munoz and Tigar v. United States District Court for the Central District of California, 446 F.2d 434 (9th Cir. 1971) 15

Odom v. United States, 455 F.2d 159 (C.A. 9 1972) 27, 28
Odom, Stein v. United States, 390 F.2d 625 (1968) 28
Oestereich v. Selective Service Board, 393 U.S. 233 (1969) 38

PAGE

Peet v. United States, 399 U.S. 523 (1970) 43

Ramos v. United States, 319 F. Supp. 1207 (D.R.I. 1970) 26, 37
Robinson v. Neil, —— U.S. ——, 35 L.Ed.2d 29 (1973) 17, 32, 33, 34

Sanders v. United States, 373 U.S. 1 (1963) ..... *passim*
Schneckloth v. Bustamonte, —— U.S. ——, 36 L.Ed.2d 854 (1973) 34, 36
Scogin v. United States, 446 F.2d 416 (8th Cir. 1971) 34, 36, 37
Sicurella v. United States, 348 U.S. 385 (1955) 41
Sunal v. Large, 332 U.S. 174 (1946) 30, 36
Swartz v. United States, 3 SSLR 3424 (C.D. Cal. 1970) 46

Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966) 23, 29
Toussie v. United States, 397 U.S. 112 (1970) 34
Tucker v. United States, 427 F.2d 615 (D.C. Cir. 1970) 25

United States v. Castillo, —— F. Supp. ——, 72 Cr. 153 (D.P.R. Mar. 23, 1973) 20, 41
United States v. Covington, 395 U.S. 57 (1969) 36-37
United States v. Crocker, 313 F. Supp. 831 (D. Minn. 1970) 13, 46
United States v. Davis, 432 F.2d 1009 (9th Cir. 1970) (Davis I) 1, 11, 48
United States v. Davis, 447 F.2d 1376 (9th Cir. 1971) (Davis II) 1, 2, 13, 15, 17, 19, 20, 27, 31, 35, 47, 48

PAGE

United States v. Davis, 472 F.2d 596 (9th Cir. 1972) (Davis III) 1, 2, 15, 16, 17, 18, 19, 20, 21, 27, 28, 35, 45
United States v. Dobie, 444 F.2d 417 (1971) 13, 47, 48
United States v. Dudley, 451 F.2d 1300 (6th Cir. 1971) 47
United States ex rel. Robinson v. Johnston, 316 U.S. 649 (1942) 15
United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972) 37
United States v. Fargnoli, 354 F. Supp. 987 (D.R.I. 1973) 37
United States v. Fox, 454 F.2d 593 (1971) ..... *passim*
United States v. Gross, 340 F. Supp. 1337 (S.D.N.Y. 1972) 20
United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971) 40
United States v. Jackson, 390 U.S. 570 (1968), rev'd on oth. gds. 400 U.S. 25 (1970) 26
United States v. Jenson, 450 F.2d 1258 (9th Cir. 1971) .. 21
United States v. Kelly, 314 F. Supp. 500 (E.D.N.Y. 1970) 37, 46
United States v. Kohls, 441 F.2d 1076 (9th Cir. 1971) .. 41, 44
United States v. Langford, 315 F. Supp. 472 (D. Minn. 1970) 26
United States v. McClintock, 311 F. Supp. 1119 (N.D. Cal. 1970) 40, 41
United States v. Malone, 336 F. Supp. 1324 (N.D. Cal. 1972) 20, 42
United States v. Ossa, 470 F.2d 816 (1972) 20, 42
United States v. Rumon, 315 F. Supp. 1126 (W.D. Pa. 1970) 46
United States v. Sellers, 315 F. Supp. 1024 (N.D. Ga. 1970) 42, 43

PAGE

United States v. United States Coin & Currency, 401 U.S. 715 (1971) 37

Vanhook v. Craven, 419 F.2d 1295 (9th Cir. 1969) ..21, 27

Wade v. United States, 426 F.2d 64 (9th Cir. 1970) 28
Waller v. Florida, 397 U.S. 387 (1970) 33
Wisniewski v. United States, 353 U.S. 901 (1957) 15

Zack v. Benson, 454 F.2d 596 (9th Cir. 1971) 14, 19, 20, 30, 35, 38, 45, 46

Constitutional Provisions:

United States Constitution
Fifth Amendment 4, 18, 33

Rules:

F. R. Cr. P. 35 16

Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §2255 .....*passim*
50 U.S.C. App. §451 *et seq.* 4
50 U.S.C. App. §455(a)(1) (1971) 6, 43, 44
Military Selective Service Act of 1967
Sec. 5(a)(1) 48

Regulations:

32 C.F.R.
§1602.4 (1967) 4, 6
§1617.1 43
§1623.5 43

PAGE

§1627 44
§1628.10 *et seq.* (1951) 40, 41
§1631.7 (1967) 7, 18, 19, 45
§1631.7(a) (1967) 4
§1631.7(a) (1969) (amended by Executive Order No. 11537, F.R. 9991 of June 18, 1970) 39, 40
§1631.7 (1970) 8, 41, 44
§1631.7(a) (1970) 4, 43, 45
§1631.7(a)(1) 39
§1631.7(b) 14
§1642 (1967) 4
§1642 (1969) 38, 39
§1642.4 ..... 6, 43
§1642.12 44
§1642.13 ..... 39, 44
§1660.20(a) 40
¶3-18 of AR 601-270, SSLR 2246 41

Other Authorities:

"Federal Habeas Corpus," 83 HARV. L. REV. 1040 (1970) 30

Stern and Gressman, SUPREME COURT PRACTICE 213-215 (1969) 15

3 U.S. Code Cong. & Admin. News, 1970, p. 6259 40

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Opinions Below

There are three opinions of the Court of Appeals, *United States* v. *Davis*, 432 F.2d 1009 (9th Cir. 1970) (*Davis I*) (Appendix to Certiorari Petition, page 1a[1]); *United States* v. *Davis*, 447 F.2d 1376 (9th Cir. 1971) (*Davis II*) (11a); *United States* v. *Davis*, 472 F.2d 596 (9th Cir. 1972) (*Davis III*) (18a-19a).

Subsequent to *Davis I* a hearing on remand was held in the United States District Court for the Central District of California. The oral findings of the district court after remand are not reported and are set forth in the petition

[1] In accordance with Memorandum re Printing received from the office of the Clerk, opinions and findings by courts below which have been included in printed petition for *certiorari* are not included in Single Appendix. Such references to material included in petition for *certiorari* will hereinafter be indicated by page number in appendix to petition for *certiorari*, i.e., "1a."

for *certiorari* at 2a-6a. The district court's findings of fact and conclusions of law after remand are not reported and are set forth in the petition for *certiorari* at 7a-10a. The order of the Court of Appeals denying rehearing, and denying the suggestion for rehearing *en banc,* subsequent to its opinion in *Davis II,* is unreported and is set forth at 12a. The order of this Court denying *certiorari* to review *Davis II* is reported at 405 U.S. 933 and is set forth at 13a. The order of the Court of Appeals denying petitioner's motion for leave to file an out of time petition for rehearing, with the suggestion for rehearing *en banc,* following this Court's denial of *certiorari* in *Davis II,* is unreported and is set forth at 14a. The order of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 is unreported and is set forth at 15a-17a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of relief under 28 U.S.C. §2255 (*Davis III*) (18a-19a), was entered on December 26, 1972. On March 21, 1973, Mr. Justice Douglas signed an order extending the time to file a petition for *certiorari* up to and including April 25, 1973. The petition for *certiorari* was filed on April 25, 1973, and was granted on November 5, 1973. On December 12, 1973, the Clerk of this Court extended petitioner's time to file the brief on the merits up to and including December 27, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that a change in the law which occurred after appellate affirmance of petitioner's conviction, and while *certiorari* was pending in this Court, could not be considered in a post-conviction proceeding brought under 28 U.S.C. §2255.

2. Whether the decision of the Court of Appeals in *United States* v. *Fox,* 454 F.2d 593, constitutes a change in the law which must be retroactively applied and requires the vacating of petitioner's conviction pursuant to 28 U.S.C. §2255.

3. Whether the decisions below, which validate a conviction for induction refusal, are predicated on an illegal delinquency-based induction order in conflict with the decision of this Court in *Gutknecht* v. *United States,* 396 U.S. 295 (1970).

4. Whether the decision of the Court of Appeals in *United States* v. *Fox, supra,* correctly expresses the principles enunciated by this Court in *Gutknecht* v. *United States, supra,* and should be adopted by this Court.

Constitutional Provisions, Statutes and Regulations

This case involves the Fifth Amendment to the Constitution of the United States; Chapter 153 of Title 28, United States Code (28 U.S.C. §2255); the Military Selective Service Act of 1967 (50 U.S.C. App. §451 *et seq.*); 32 C.F.R. 1602.4 (1967); 32 C.F.R. Part 1642 (1967); 32 C.F.R. 1631.7 (a) (1967); and 1631.7(a) (1970).

The pertinent texts of these provisions are as follows:

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maxi-

mum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it ap-

pears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Section 5(a)(1), Military Selective Service Act of 1967, 50 U.S.C. App. §455(a)(1)

The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted. . . .

32 C.F.R. §1602.4 Delinquent.

A "delinquent" is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

32 C.F.R. §1642.4 Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the

date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

. . .

32 C.F.R. §1631.7 (1967) Action by local board upon receipt of notice of call.

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for in-

duction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

. . .

32 C.F.R. §1631.7 (1970)

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I–A or Class I–A–O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided,* That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I–A or Class I–A–O

has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. . . .

Statement of the Case

Petitioner registered with Selective Service Local Board No. 101, Los Angeles, California, on October 4, 1963 (8a). On February 3, 1965, he was classified I-A. On February 16, 1965, he was ordered to report for an Armed Forces physical examination on March 4, 1965 (A12).[2] On the appointed day, petitioner failed to report but subsequently contacted the local board and explained that his failure to report was due to illness (SSF 28).[3] On September 19,

[2] "A" references refer to the Appendix to the briefs ("Single Appendix"), separately printed and filed pursuant to Rule 36.

[3] "SSF" references refer to petitioner's paginated Selective Service File, Government's Exhibit 1 in the trial court.

1965, petitioner was ordered to report for a pre-induction physical examination on October 8, 1965 (A12, SSF 30). The order was mailed to a post office box address in Los Angeles supplied to the local board by petitioner. On September 22, 1965, the order was returned to the local board, stamped, "Addressee Unknown" (SSF 31). Petitioner did not report for his pre-induction physical on October 8, 1965. Subsequently, on December 6, 1965, petitioner was mailed a California Selective Service Form 304, "Delinquency Warning" (A13, SSF 32), which notified petitioner that his local board was "considering declaring you to be delinquent . . ." and further that,

> "A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants . . . any further noncompliance on your part could result in your immediate induction" (A13, SSF 32).

This notice was mailed to the same Los Angeles post office box as the previous physical examination orders had been mailed to. In addition, the "Delinquency Warning" was mailed to another Los Angeles address, "3781¼, Menlo." The "warnings" were received back at the local board on December 15, 1965, and April 14, 1966, respectively, stamped, "Unknown" (SSF 33-35). Thereafter, on May 4, 1966, petitioner's local board declared him to be a delinquent pursuant to 32 C.F.R. Part 1642, et seq., and mailed him a Delinquency Notice, SSS Form 304 (A14) at the "Menlo" address. On the same day, petitioner appeared at the local board and completed a Current Information Questionnaire, again giving the "Menlo" address as his

current mailing address (SSF 41). Thereafter, on February 21, 1967, petitioner was ordered to report for induction (A15). On the face of the induction order was typed the word "Delinquent" (A15). Mailed to the "Menlo" address, the order was returned to the local board undelivered on February 23, 1967 (SSF 44).

On the day set for his induction, March 7, 1967, petitioner did not report (A12). His selective service file was subsequently forwarded to the California State Headquarters of Selective Service for review. It was then returned to the local board with instructions from the State Director to reorder petitioner for induction by mailing such an order to a third address in St. Paul, Minnesota, previously supplied to the local board by petitioner (SSF 46). On June 20, 1967, an order to report for induction on July 11, 1967 was mailed to petitioner at his Minnesota address. As did the previous induction order, the order of June 20th had the word "Delinquent" typed on the face (A16). The Minutes of Action (A12), also reflect that petitioner was ordered "as Del [*sic*]." On July 11, 1967, petitioner failed to report for induction.

Proceedings Below

Petitioner was originally tried to a jury and convicted of having failed to report for induction on the July 11, 1967, date. On appeal, the Ninth Circuit remanded without limitation of scope but especially for consideration of the case in light of . . . Gutknecht v. United States . . ." 432 F.2d at 1010 (*Davis I*) (1a). On remand the district court, Hauk, D.J., found:

"... 21 others were younger than [petitioner and] were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration. Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction" (3a-4a).

Judge Hauk went on to hold that:

"... even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable

for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service Law, and this 1602.4 has not been outlawed either by Gutknecht" (4a).[4]

On the second appeal, the Ninth Circuit, in a short per curiam handed down on August 12, 1971, affirmed the conviction, finding no "acceleration" within the meaning of *Gutknecht* v. *United States,* 396 U.S. 295 (1970). 447 F.2d 1376 (*Davis II*). In addition, the court ruled, without explanation, that the plainly conflicting opinion of the Fourth Circuit in *United States* v. *Dobie,* 444 F.2d 417 (1971) was "distinguishable" (11a). See Point II, *infra,* pp. 47-48.

A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (12a).

On November 12, 1971, a petition for certiorari, No. 71-661, was filed.

In response to the petition for certiorari, the Solicitor General in his initial Memorandum for the United States in Opposition, conceded at page 7 thereof,

"that regulations applicable when [petitioner] was ordered to report permitted local boards to issue in-

[4] In support of these contentions, the district court relied substantially on the reasoning of the opinion in *United States* v. *Crocker,* 313 F. Supp. 831 (D. Minn. 1970) (5a-6a), which opinion, we respectfully submit, is totally in error. See Point II, *infra,* pp. 38-46.

duction orders to delinquents without a prior pre-induction-physical and statement of acceptability, and that [petitioner] received his order pursuant to those regulations."

Following the filing of the petition for certiorari and the Solicitor General's Memorandum In Opposition, the court below, on December 30, 1971, decided the cases of *United States* v. *Fox*, 454 F.2d 593, and *Zack* v. *Benson*, 454 F.2d 596. These decisions held that registrants like petitioner who had been ordered to report for induction as delinquents pursuant to 32 C.F.R. 1631.7(b), and whose delinquency status had stemmed from the failure to report for a pre-induction physical examination, were illegally ordered for induction as a matter of law under this Court's decision in *Gutknecht* v. *United States, supra.*

These cases were brought to the attention of this Court by way of a Supplemental Memorandum. The Solicitor General, in response, filed his own Supplemental Memorandum For the United States In Opposition. At page 2 thereof, it was conceded that

"the holdings in *Fox* and in the present case are inconsistent . . ."[5]

Nevertheless, he urged this Court to deny certiorari on the theory that,

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[5] The statement by the panel sitting in *Fox, supra,* that "the nature of the delinquency" did not appear in petitioner's case, 454 F.2d at 594, was, with all due respect, plainly erroneous. The record in this case clearly discloses, and the government acknowledged both before this Court and before the Ninth Circuit in its unsuccessful Petition for Rehearing in *Fox,* at page 11 thereof, that the basis for petitioner's delinquency was identical to Fox's—failure to report for a physical examination.

"the conflict is an intra-circuit one and presumably will be resolved by the Ninth Circuit itself . . ." *Id.*

Thereafter, certiorari was denied on February 22, 1972, 405 U.S. 993 (13a). In light of the Solicitor General's suggestion that the conflict between *Fox, supra,* and petitioner's case be resolved by the Ninth Circuit itself, the denial of certiorari seemed understandable. See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942); *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

Accordingly, a motion for an extension of time in which to file an out of time petition for rehearing with a suggestion for rehearing *en banc,* accompanied by the petition for rehearing with suggestion for rehearing *en banc,* was tendered to the Court below on April 19, 1972. The petition requested the Court to resolve the concededly existing conflict between the opinions in *Davis II,* 447 F.2d 1376, and in *Fox,* 454 F.2d 593.*

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* It is difficult to imagine a case which could more clearly have warranted *en banc* reconsideration than petitioner's; especially in view of the government's own attempts to secure a rehearing in *Fox.* Indeed, the panel which wrote the opinion below appeared to have recognized the desirability for such an *en banc* determination of petitioner's case. See *Davis III* at n. 1 (19a).

Further, neither the passage of time, *Huddelston* v. *Dwyer,* 322 U.S. 232 (1944), nor the prior denial of certiorari, *Braniff Airways Inc.* v. *Curtiss-Wright Corp.,* 424 F.2d 427, 429-430 (2d Cir. 1970); *Meehan* v. *Macy,* 425 F.2d 469 (D.C. Cir. 1968), was a bar to rehearing *en banc* at that time. Cf. *Davis* v. *Balkcom,* 369 U.S. 811 (1962). See also, Stern and Gressman, SUPREME COURT PRACTICE 213-215 (1969). The petition, under Ninth Circuit law, could also have been properly construed as a timely motion to recall the mandate. *Munoz and Tigar* v. *United States District Court for the Central District of California,* 446 F.2d 434, 436 (9th Cir. 1971).

On May 22, 1972, however, the Ninth Circuit denied the motion and returned the petition for rehearing to petitioner's counsel (14a).

Thereafter, on June 5, 1972, the District Court spread on the record the judgment of this Court denying certiorari and remanded petitioner to custody[7] to begin serving his sentence of three years imprisonment. At the same time, petitioner's motion seeking relief under 28 U.S.C. §2255 was forthwith denied (16a). Motions made for bail pending an appeal of the denial of the §2255 motion as well as a motion under F.R. Cr. P. 35 for reduction or modification of sentence were taken under advisement. The Rule 35 motion was thereafter granted by the district court in part (A3), and petitioner was subsequently released from incarceration after having served a total of four months of his three year term, and he was ordered placed on probation for the remainder.

An appeal to the Ninth Circuit from the summary denial of relief under 28 U.S.C. §2255 followed and it is from that decision, affirming the denial of post-conviction relief, 472 F.2d 596 (*Davis III*) (18a), for which certiorari was sought, and granted on November 5, 1973.

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[7] Petitioner had been at large on $10,000.00 bail pursuant to orders of Mr. Justice Douglas dated November 27, 1971 and January 8, 1972 (A2).

Summary of Argument

I.

A change in Ninth Circuit law occurred between *Davis II*, the affirmance of petitioner's conviction for induction refusal on direct appeal, and *Davis III*, where the court below affirmed the decision of the district court denying post-conviction relief pursuant to 28 U.S.C. §2255. In *Davis II*, the Ninth Circuit held that petitioner's conviction could stand, notwithstanding his induction pursuant to Selective Service delinquency regulations, because of the district court's finding that petitioner's induction was not accelerated as a matter of fact. Subsequent to *Davis II*, the Ninth Circuit held in *United States* v. *Fox*, 454 F.2d 593 (1971), that an induction order based on a declaration of delinquency following a failure to appear at a physical examination was invalid *per se*, and such *per se* invalidity made it unnecessary to consider whether or not petitioner's induction was accelerated in fact. This obvious change in law has been acknowledged by the Solicitor General, yet the Ninth Circuit inexplicably refused to honor it.

This Court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969), and *Sanders* v. *United States*, 373 U.S. 1 (1963), are solid authority that §2255 relief is available in this case. Various courts of appeals, interpreting *Kaufman* and *Sanders*, have vacated judgments of conviction based on intervening changes in law. The distinctions between *Kaufman* and *Sanders* and this case suggested by the Solicitor General are inapplicable and without merit. An intervening change in law which occurs post-appellate affirmance of conviction is a particularly appropriate occasion for relief under 28 U.S.C. §2255.

Moreover, where the intervening change in law must be retroactively applied, as is the case with the *Gutknecht* doctrine, post-conviction relief is compelled. See *Robinson* v. *Neil*, —— U.S. ——, 35 L.Ed.2d 29 (1973).

The denial of §2255 relief in this case is in any event contrary to the ends of justice. None of the considerations

suggested by various Justices of the Court for limiting post-conviction relief are applicable here.

II.

The various Selective Service delinquency regulations in effect at the time of petitioner's conviction purported to authorize Selective Service local boards to impose three species of sanctions against Selective Service registrants whom boards found to be delinquent in complying with their obligations under the Selective Service laws and regulations: (1) change of classification from a deferred or exempt classification to I-A; (2) accelerated induction rather than induction in accordance with normal order of call regulations; and (3) induction without a prior pre-induction physical examination and the issuance of a statement of acceptability following such pre-induction physical examination. This Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970) and related cases held that the delinquency regulations had never been authorized by Congress and were beyond the powers conferred by Congress on the President, thereby necessarily implicating constitutional rights under the Fifth Amendment. These holdings were in the context of the first two species of delinquency sanctions, and this Court has not yet had occasion to rule on the third species of delinquency sanction, induction without a pre-induction physical examination and a statement of acceptability. However, the Court of Appeals for the Ninth Circuit in *United States* v. *Fox, supra,* has so ruled, holding that this Court's decision in *Gutknecht* v. *United States, supra,* compelled the invalidation of former 32 C.F.R. §1631.7 (1967), the regulation which provided for the third species of delinquency sanction. The court below erred in not applying the *Gutknecht-Fox* rationale in *Davis III,* particularly since *Gutknecht* must be retroactively applied, and the Ninth Circuit has in fact applied *Fox* retroactively in *Zack* v. *Benson,* 454 F.2d 596 (9th Cir. 1971).

I.

An intervening change in the law which would require petitioner's acquittal having occurred after affirmance of petitioner's conviction, and while certiorari was pending, the Court below erred in denying post-conviction relief under 28 U.S.C. §2255.

1. ***Although the Ninth Circuit panel which decided* Davis III *inexplicably refused to acknowledge the change, the Ninth Circuit's decision in* United States v. Fox, *454 F.2d 593 (1971), unmistakably effected a change in the law, which, had it existed at the time of* Davis II, *would have resulted in petitioner's acquittal.***

Petitioner's conviction was affirmed by the District Court (10a) and by the Ninth Circuit in *Davis II* (11a) on the grounds that his induction had not been "accelerated" in fact (9a), notwithstanding the finding that he had been declared delinquent for failure to report for a physical examination, and been ordered to report for induction as a delinquent, without the required physical examination and statement of acceptability (8a). Thus the *Davis II* panel appeared to follow a rule that in such cases, the validity of the induction order would depend on a case by case determination of acceleration in fact.

United States v. *Fox, supra,* on the other hand, ruled that a delinquency-based induction order, where the delinquency badge was affixed because of a failure to appear at a physical examination, is invalid *per se,* and no factual inquiry is necessary. It specifically ruled that former 32 C.F.R. §1631.7 (1967), which purported to authorize delinquency induction without a physical examination, was

invalid under the doctrine of *Gutknecht* v. *United States*, 396 U.S. 295 (1970). See discussion in Point II, *infra*, pp. 38 *et seq.*

This change in law is acknowledged by the Solicitor General (Memo in Opp., page 2). It was acknowledged by the United States Attorney for the Central District of California, who won *Davis* for the government, and lost *Fox*. See *United States* v. *Fox, supra*, Government's Petition for Rehearing, page 11. Moreover, the only Ninth Circuit decision which cites *Fox*, other than *Davis III*, recognizes the change wrought by *Fox*. See *United States* v. *Ossa*, 470 F.2d 816, 818-819 (1972).[8]

That a change in law occurred from *Davis II* to *Fox* is no more than a common sense observation. Two Selective Service registrants, each charged with an identical offense, in the same district, and each presenting the same defense, have had legal results as widely disparate as the criminal law knows: Davis went to jail, and Fox went free.[9] See also *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971). Regardless of what consequences may flow from this change, it simply boggles the mind to suggest or imply that a change has not occurred.

It is indeed true that the court below wrote in its cryptic *per curiam*, 472 F.2d at 596 (19a), "... that *Fox* does not

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[8] That *Fox* is now the rule in the Ninth Circuit has been noted by judges in other districts. See *United States* v. *Gross*, 340 F. Supp. 1337, 1338, n. 1 (S.D.N.Y. 1972); *United States* v. *Castillo*, —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973) (Petitioner's Reply Brief, p. 5a). See also *United States* v. *Malone*, 336 F. Supp. 1324, 1329 (N.D. Cal. 1972).

[9] Cf. *Fay* v. *Noia*, 372 U.S. 391, 441 (1963), where this Court held that Federal habeas corpus relief was required to redress the disparate treatment of co-defendants who had been convicted of murder.

even suggest overruling *Davis* . . . ", and added in a footnote, without benefit of citation, "For that matter, an in banc proceeding would be required to overrule a previous panel decision." But it is elementary that "new law" or "change in law", whatever it means, is certainly not confined to the formal overruling by a Court of Appeals of its own prior decision.[10] Indeed, the Ninth Circuit itself has recognized that §2255 petitions premised on changes in law will be entertained where there are intervening decisions which do not flatly overrule prior law, but "which have a direct and substantial bearing . . . " upon the issues raised. *Vanhook* v. *Craven,* 419 F.2d 1295, 1296 (9th Cir. 1969).

The judges who sat on the panel of *Davis III* may have been as unimpressed with petitioner's Selective Service history as were the judges on the panel in *Fox.* See 454 F.2d at 595-596. But whatever their reasons for refusing to give petitioner the benefit of the new law created by *United States* v. *Fox,* it is, we respectfully suggest, an inexcusable exercise in judicial blindfoldedness to refuse to recognize that a change has occurred.[11]

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[10] It is significant that the Court below in its *per curiam* does not state that *Fox* is not new law. It is content with the implication that *Fox* does not "overrule" *Davis* (19a).

[11] It is apparently the rule in the Ninth Circuit that the most recent decision of a panel "is binding upon all other panels of the court." *United States* v. *Jenson,* 450 F.2d 1258, 1264 (9th Cir. 1971). See *Etcheverry* v. *United States,* 320 F.2d 873, 874 (1963).

2. *The decisions of this Court in* Kaufman v. United States, *394 U.S. 217 (1969), and* Sanders v. United States, *373 U.S. 1 (1963), expressly authorize post-conviction relief where there has been an intervening change in the law, after appellate affirmance of a conviction.*

The government does not appear to contest the proposition that at least under some circumstances §2255 authorizes review of a post-appellate affirmance change in the law. Indeed, it has conceded that whether or not the *Fox* decision must be considered "new law" "is unclear" (Memo in Opp., page 5). The government has cited no authority in support of a doctrine which would preclude *Fox* from being considered "new law" under *Kaufman* and *Sanders*.

Petitioner urges, on the contrary, that *Kaufman* and *Sanders*, as explicated and applied by virtually every court of appeals which has ruled on the question, compel a determination that §2255 relief is available in this case. *Sanders* v. *United States, supra,* was the occasion where this Court expressly set out to consider and determine "the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U.S.C. §2255." 373 U.S. at 2. The case arose in the context of a second §2255 application where a prior application had been denied. Nevertheless, in systematically considering and determining the occasions where "Successive Motions on Grounds Previously Heard and Determined," 373 U.S. at 15, should be considered, the Court provided guidelines which are obviously no less applicable in the case of an initial motion for §2255 relief such as in this case. It is respectfully submitted that Mr. Justice Brennan's opinion, for the Court, sets forth the

rationale which should have compelled the courts below to grant petitioner's application:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in Townsend v. Sain, supra, and that discussion need not be repeated here. *If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law* or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First,* the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized. *Second,* the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground." 373 U.S. at 16-17 (emphasis added).

Six years later, this Court in *Kaufman* v. *United States, supra,* reiterated that an intervening change in law was an appropriate basis for post-conviction relief, this time in the context of an initial application for Federal post-conviction relief. The Court's opinion expressly adopted in its entirety Judge Wright's dissent in *Thornton* v. *United States,* 368 F.2d 822, 831 (D.C. Cir. 1966):

"Federal prisoners applying for collateral relief often have had their constitutional claims passed on by federal courts at trial or on appeal, so the Brown v. Allen rationale for federal court relitigation is inapposite. But this difference provides no basis for limiting the grounds upon which federal prisoners may obtain collateral relief, or for formulating a separate set of rules to determine when a federal prisoner's claim has adequately been adjudicated. Where a federal trial or appellate court has a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it is unclear whether the 'say' was on the merits? *What if new law has been made* or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of Townsend v. Sain, 372 US 293 [9 L Ed 2d 770, 83 S Ct 745] (1963)? All these problems are common to state and federal prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded. It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications." 394 U.S. at 230 (emphasis added).

The government nevertheless argues that Judge Wright's formulation, although adopted *in haec verba* by *Kaufman*, is dicta, and that neither *Kaufman* nor *Sanders* is in point. (Memo in Opp., page 5.) It is, of course, always possible for an advocate to attempt to so refine and distinguish a holding to its narrowest point so that an argument of inapplicability can be mustered. That the distinctions proffered by the government are the proverbial distinctions without differences is set forth later in our argument, see *infra*, pp. 28-31. It is not, however, necessary for petitioner to break new ground by demonstrating the lack of merit in the government's distinctions in order to elucidate a doctrine which compels relief for petitioner, since several courts of appeals have already done so.

In *Tucker* v. *United States*, 427 F.2d 615 (D.C. Cir. 1970), the Court of Appeals, citing *Kaufman* and *Sanders*, reversed a District Court denial of post-conviction relief (several prior applications having been denied), where the pending application made several claims. The court pointed out:

> "... at least one of appellant's claims rests upon an intervening change in the law, which would entitle him to a new hearing even if the merits had been determined adversely to him prior to that time." 427 F.2d at 617-618 (footnotes omitted).

In accord is the decision of the Fourth Circuit in *Alford* v. *North Carolina*, 405 F.2d 340 (1969). A state prisoner sought federal habeas corpus relief[12] after appellate af-

[12] It is, of course, well-settled that the scope of post-conviction habeas corpus relief available to a state prisoner is identical to

firmance of his conviction, based on this Court's decision in *United States* v. *Jackson*, 390 U.S. 570 (1968). The State of North Carolina opposed post-conviction relief since "the grounds asserted to support the petition have been previously decided on the merits . . ." 405 F.2d at 342. Applying *Sanders*, the Fourth Circuit rejected this argument because ". . . the instant appeal deals primarily not with new factual allegations but, rather, with what is admittedly a new question of law, namely, the applicability and effect of the Supreme Court's recent decision in the *Jackson* case." *Ibid.*[13]

To the same effect is *Gray* v. *United States*, 407 F.2d 831 (5th Cir. 1969), which held that post-conviction relief under §2255 was available based on intervening decisions of this Court. Anticipating and rejecting any suggestion that considerations of finality should bar relief, Chief Judge Brown wrote:

> "Time and tide which wait for no man and the congenital delay of adjudication are often deplored. Here delay and time have wrought a great boon to appellant." 407 F.2d at 831.[14]

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that available to a federal prisoner under 28 U.S.C. §2255. See *Kaufman* v. *United States*, *supra*, 394 U.S. at 221-222; *Sanders* v. *United States*, *supra*, 373 U.S. at 13-14; *Hill* v. *United States*, 368 U.S. 424, 427 (1962).

[13] Although the Supreme Court reversed on other grounds, 400 U.S. 25 (1970), none of the justices in either the majority or the minority (nor Chief Judge Haynsworth, who dissented in *Alford*, 405 F.2d at 349), raised any questions concerning the propriety of the Court of Appeals and of the Supreme Court considering the intervening question of law in a post-conviction proceeding.

[14] See also *Ramos* v. *United States*, 319 F. Supp. 1207, 1209 (D. R.I. 1970); *United States* v. *Langford*, 315 F. Supp. 472 (D. Minn. 1970); *Isaac* v. *United States*, 293 F. Supp. 1096 (D.S.C. 1968).

Moreover, the Ninth Circuit itself has rejected considerations similar to that raised by the government and, on the authority of *Sanders*, held that an application for post-conviction relief must be entertained where "subsequent to this court's [the Ninth Circuit's] affirmance of the district court's rejection of his first petition, the Supreme Court of the United States rendered a number of decisions which have a direct and substantial bearing upon the constitutional issues underlying his claim. . . . In these circumstances, 'the ends of justice would be served by permitting the redetermination of the ground' in a new petition." *Vanhook* v. *Craven*, 419 F.2d 1295, 1296 (9th Cir. 1969). See also *Jack* v. *United States*, 435 F.2d 317, 319 (9th Cir. 1970) ("The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding").

In the face of this solid body of law from this Court and from various courts of appeals, including itself, the decision below denying §2255 relief because the issues tendered by petitioner were "precisely the same as the ones presented and decided adversely to appellant in *United States* v. *Davis*" [*Davis II*] (19a), is simply inexplicable, and with respect, entirely incorrect. No effort was made by the Court below to explain its holding, or to interpret *Kaufman* and *Sanders*. There is only the cryptic statement that "the decision on the direct appeal is the law of the case. Odom v. United States, 455 F.2d 159, 160 (C.A. 9 1972)" (19a).

Odom v. *United States, supra*, offers no more enlightenment as to why §2255 relief is not available in this case than does *Davis III*. However, two Ninth Circuit decisions cited in *Odom* suggest that the Court below might have

been relying upon them for the proposition "that when a matter has been decided adversely on an appeal from a conviction, it cannot be litigated again on a 2255 motion." *Odom* v. *United States*, 455 F.2d at 160.[15] The prior decisions cited in *Odom*, *Stein* v. *United States*, 390 F.2d 625 (1968), which is pre-*Kaufman*, and *Fiano* v. *United States*, 291 F.2d 113 (1961), which is pre-*Kaufman* and pre-*Sanders*, assuming that they support *Odom*, are equally incorrect. The only possible way to explain *Odom* is not in terms of unavailability of §2255 relief where there is an intervening change in law, but only by recognizing that there was *no* intervening change in law. In fact, the *Odom* petitioner sought to take advantage of the new insanity rule announced by the Ninth Circuit in *Wade* v. *United States*, 426 F.2d 64 (9th Cir. 1970), which, although it was decided only six days after the Ninth Circuit's affirmance of Odom's conviction, anticipated possible post-conviction applications in other cases, and expressly pretermitted such applications by holding that *Wade* would not be retroactively applied. 455 F.2d at 160.

In its unsuccessful attempt to oppose *certiorari* in this case, the government suggested three distinctions between the *Sanders-Kaufman* doctrine and this case. (Memo in Opp., pp. 5-6.) None of them is of any merit.

(1) It is pointed out that in neither *Sanders* nor *Kaufman* was the issue on which §2255 relief was sought raised on direct appeal. Indeed, in *Kaufman* it was a new ques-

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[15] Neither *Odom*, nor *Davis III*, makes any effort to reconcile this statement with the contrary prior holding two years earlier in *Jack* v. *United States*, *supra*: "The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding." 435 F.2d at 319.

tion of unlawful search and seizure which petitioner had not raised on direct appeal, and in *Sanders*, where there was a guilty plea, the issue could have been previously raised, but on a prior §2255 application rather than on direct appeal. These are distinctions without differences.

Kaufman, by adopting Judge Wright's dissent in *Thornton, supra*, states flatly that an intervening change in the law *is* a fit subject for §2255.[16] As the Harvard Law Review observed in its extensive review of Federal Habeas Corpus, "... the fact that an appellant seeks to raise in collateral proceedings a claim previously reviewed on appeal should not be a bar to relief when there has been a change of law ... since the appeal." 83 HARV. L. REV. 1040, 1065-1066, n. 144 (1970).

And nothing in *Sanders*, which allows a second post-conviction application under certain circumstances, necessarily precludes a *first* application merely because the same ground was determined adversely on the direct appeal. Indeed, the essence of *Sanders* is that considerations of finality cannot bar even a series of §2255 applications if in fact the petitioner ultimately raises a valid point. *Sanders, supra*, 373 U.S. at 8-9. And if a §2255 petitioner is not to be barred from having a claim considered if it could have been raised previously but was not, it would follow *a fortiori* that the petitioner is not to be barred when he raised the question previously as best he could, but was denied relief only because of the prior state of the law, which has since changed to his advantage.

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[16] This may indeed be dicta, see Memo in Opp., p. 5, n. 3, but *Kaufman's* rationale offers no basis for suggesting that petitioner should have the benefit of newly discovered facts, but should not have the benefit of newly declared law.

Limiting *Sanders* to allowing successive §2255 applications if the issue had not been raised on direct appeal, but barring any and all §2255 applications if the issue had been unsuccessfully raised on appeal, would produce the anomalous result of discouraging the utilization of the direct appellate process, the very evil against which courts considering post-conviction applications have traditionally and continuously warned. See "Federal Habeas Corpus," 83 HARV. L. REV. 1040, 1041 (1970). Indeed, *Sunal* v. *Large*, 332 U.S. 174 (1946), looms as an admonition against abandoning even an appeal which appears to be futile under the existing state of the law, lest the consequence be the denial of post-conviction relief when the unexpected change in the law does in fact occur. *Sunal* points out that had the habeas corpus petitioners there "pursued the appellate course and failed, their cases would be quite different." 332 U.S. at 181.[17]

(2) The second distinction suggested by the government is that *Sanders* authorizes §2255 consideration only of a new "ground" for relief, but not of a new "argument"

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[17] If petitioner, thinking that an appeal would be futile would have elected not to appeal, the government would certainly argue that he should be barred from relief under *Sunal* v. *Large*, *supra*. But see "Federal Habeas Corpus," 83 Harv. L. Rev. 1040, 1069-1070, note 167 (1970): "Instances in which there has been a change of law after the time for further appeal has lapsed present a particularly persuasive argument for opening the collateral jurisdiction to errors of law. . . . [I]t seems questionable whether such a strict rule of waiver [referring to *Sunal* v. *Large*] would be applied today." See *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), discussed *infra*, p. 35. On the other hand, the government is now arguing that petitioner should be denied relief precisely because he sought to do that which *Sunal* v. *Large* says he would be penalized for not doing. Any result other than one which allows relief to petitioner would cage a federal defendant in the Kafkaesque dilemma where he is damned if he does and damned if he does not.

relating to the same ground. *Sanders* does indeed suggest such a distinction, 373 U.S. at 17, but at the same time it makes clear that a "purely legal" question, such as "an intervening change in the law" is a new "ground" rather than simply a new "argument" concerning an old ground. Indeed, the very point at issue in this case can hardly be considered a "new argument." It is not as if petitioner has been stimulated by a new decision to make a new argument. The opposite is true. Petitioner and his counsel have consistently made this argument at every level of this case, but it has only become a new ground for relief since the intervening change in the law created by the *Fox* case.

(3) Nor is the third suggested distinction, between a constitutional and a non-constitutional claim, any more persuasive. If *Davis II* is incorrect, and if *Fox* is correct, as petitioner contends, then he has been invalidly and unjustly convicted on the basis of a delinquency status which was never authorized by Congress, and which resulted in his deprivation of liberty without due process of law. It is too late in the day to assert that *Gutknecht* v. *United States*, 396 U.S. 295 (1970), is not a constitutional holding,[18] and the decision in *Fox, supra,* is no more than the application of *Gutknecht's* constitutional holding to the species of delinquency processing which was utilized in this case. See Point II, *infra,* pp. 38 *et seq.* Moreover, the various decisions holding *Gutknecht* fully retroactive underscore its constitutional holding. See Point II, *infra,* p. 46.

In *Hodges* v. *United States*, 282 F.2d 858, 866 (D.C. Cir. 1960), Judge Fahy anticipated much of what this Court would explicate in greater detail in *Sanders* by pointing

[18] But see *Brough* v. *United States*, 454 F.2d 370 (7th Cir. 1970), where post-conviction relief was granted on the basis of intervening statutory holdings.

out that the essence of §2255 was to provide a forum for claims "arising only in such circumstances as to be assertable collaterally rather than directly, as is the case when the ground asserted is a violation of the laws of the United States." Accord: *Larson* v. *United States*, 275 F.2d 673, 679 (5th Cir. 1960) (per Wisdom, J.). It is plain that an intervening change in the law which occurs post-appeal is, by its very nature a claim which is "assertable collaterally rather than directly." Any attempts to pursue such a claim on direct appeal by urging or anticipating a change in the law may or may not be successful. But the claim is only "assertable" as a change of law, i.e., entitled to relief, after the intervening change in the law has occurred.[19]

3. *Post-conviction relief is compelled in this case because the intervening change in the law must be retroactively applied.*

The logic of *Kaufman* v. *United States, supra,* and *Sanders* v. *United States, supra,* which authorize post-conviction relief where justice so requires, including a case where there has been an intervening change in the law to petitioner's benefit, would seem to compel the granting of such relief where the intervening change in the law is of a character which must be applied retroactively. This Court has squarely so held in the recent decision of *Robinson* v. *Neil,* —— U.S. ——, 35 L. Ed.2d 29 (1973).

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[19] It is therefore logically impossible to contend (Memo in Opp., p. 5) that in this case petitioner's change of law claim has been adjudicated on direct appeal, and is consequently not within the *Kaufman* rationale. On direct appeal, the claim that *Gutknecht* was improperly applied by the district court was certainly not a claim of new law, since the new law, the *Fox* decision, had not yet been born. The government's position only makes sense if applied to a change in law which occurs in time to be urged on direct appeal, and is urged on direct appeal, but rejected. Only in that event can it be said that "the claim had already been adjudicated." (Memo in Opp., p. 5.)

The petitioner in *Robinson* was a state prisoner who sought federal habeas corpus after his Tennessee conviction had been affirmed in the state courts, "basing his arguments on this Court's intervening decisions in Benton v. Maryland, 395 US 784 . . . 1969, and Waller v. Florida, 397 US 387 . . . 1970," 35 L. Ed.2d at 31. The Court noted at the outset of its opinion that *certiorari* was granted for the specific purpose of deciding the retroactivity of *Waller v. Florida*, which construed the double jeopardy clause of the Fifth Amendment. After summarizing the principles of retroactivity established by this Court in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court concluded that the *Linkletter* test of retroactivity, i.e., limiting retrospective effect solely to "those procedural rules affecting the very integrity of the fact finding process," 35 L. Ed.2d at 33, was simply inapplicable to a case which did not involve "procedural rights and methods of conducting trials . . ." 35 L. Ed.2d at 32. Writing for the Court, Mr. Justice Rehnquist pointed out:

> "The guarantee against double jeopardy is significantly different from procedural guarantees held in the Linkletter line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern the conduct of a trial." 35 L. Ed.2d at 33.[20]

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[20] The effect of a successful double jeopardy claim is to prevent a second trial from taking place at all. But the effect of a successful claim that an induction order is invalid is to vacate the initial conviction and dismiss the indictment. Thus Mr. Justice Rehnquist's rationale should apply *a fortiori* to this case.

It is significant that no member of the Court, which was unanimous in its holding in favor of retroactivity, even intimated that petitioner should not have been entitled to have his claim for habeas corpus relief, based on "intervening decisions," 35 L. Ed.2d at 31, fully entertained and considered on the merits. Compare *Schneckloth* v. *Bustamonte*, —— U.S. ——, 36 L. Ed.2d 854, 876 (1973) (concurring opinion of Mr. Justice Powell).

Indeed, an intervening change in the law which must be retroactively applied would appear to be the most singularly appropriate occasion for the grant of post-conviction relief under 28 U.S.C. §2255. See *Brough* v. *United States*, 454 F.2d 370 (7th Cir. 1972);[21] *Gray* v. *United States*, 407 F.2d 831 (5th Cir. 1969); *Scogin* v. *United States*, 446 F.2d 416 (8th Cir. 1971). As Judge Austin succinctly pointed out in *Escobedo* v. *United States*, 350 F. Supp. 894, 895-896 (N.D. Ill. 1972), the *Sanders* doctrine is invoked where there are "intervening decisions which would retroactively set aside plaintiff's convictions. . . ."

As is demonstrated below, see Point II, *infra*, p. 46, *Gutknecht* v. *United States* has been held fully retroactive by every court of appeals which has ruled on its retroactivity, and by virtually every district court. The Solicitor General, although unjustifiably accusing petitioner of urging "a broad rule of automatic and universal retroactivity" (Memo. in Opp., page 6), does not intimate that *Gutknecht* should not be given fully retroactive application. And

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[21] In *Brough*, a §2255 case where *Toussie* v. *United States*, 397 U.S. 112 (1970), was held fully retroactive, Judge Hastings engages in a thorough analysis of this Court's retroactivity decisions, and concludes: "At no time has it [this Court] denied retroactive application to a *statutory* interpretation which would invalidate a prior conviction." 454 F.2d at 372.

since *Fox* is simply an application of *Gutknecht* to a species of delinquency processing, the Solicitor General would be hard pressed, we respectfully suggest, to find some basis for urging that while *Gutknecht* should be retroactively applied, *Fox* should not.[22]

Finally, it is even more significant that in the one case which had occasion to consider whether or not *Fox* should be applied retroactively, it was retroactively applied. In *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), decided the same day as *United States* v. *Fox*, a different panel of the Ninth Circuit granted §2255 relief to a federal prisoner "on the authority of *United States* v. *Fox*." *Ibid.*[23]

4. *In any event, post-conviction relief should have been granted in this case in the interest of justice.*

This Court concluded its systematic delineation of grounds for §2255 relief by the repeated reminder that "the test is 'the ends of justice' and it cannot be too finely particularized." *Sanders, supra*, 373 U.S. at 17. That the ends

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[22] It is significant that in all of his submissions to this Court in opposition to *certiorari*, both on the prior unsuccessful petition from *Davis II* as well as this one from *Davis III*, the Solicitor General, while indicating the Government's disagreement with *Fox*, and urging this Court not to consider the question on the basis of a post-*Fox* change in regulation, see Point II, *infra*, pp. 40-41, at no point made the argument that *Fox* should only be given prospective application. Indeed, the intimation in the Memorandum in Opposition is that *Fox* might well have retroactive application because the Solicitor General refers to an unknown number of "untried indictments . . . involving facts and situations similar to the one in this case. . . ." Memo. in Opp., page 4.

[23] For a delineation of cases which have consistently applied retroactively decisions which overturn or construe Selective Service regulations and procedures, see *Brough* v. *United States, supra*, 454 F.2d at 373.

of justice will be served by granting §2255 relief in this case is clear beyond question. To begin with, there has been no "deliberate bypass" of any possible remedy available to petitioner. Compare *Fay* v. *Noia, supra,* 372 U.S. at 438; *Sunal* v. *Large, supra.* Moreover, the special problems of sensitivity to federal-state relations which would be of serious moment in a habeas corpus application are completely removed from this §2255 case. Thus the concerns expressed by Mr. Justice Powell and the other Justices who joined in his concurring opinion in *Schneckloth* v. *Bustamonte,* —— U.S. ——, 36 L. Ed.2d 854, 876 (1973), are inapplicable to this case.

Moreover, this is not a case where a collaterally raised claim, even if constitutionally justified, would have no bearing on the guilt or innocence of the defendant. Cf. Mr. Justice Black's dissenting opinion in *Kaufman* v. *United States,* 394 U.S. at 231 *et seq.; Schneckloth* v. *Bustamonte, supra* (concurring opinion of Mr. Justice Powell). On the contrary, if §2255 relief is granted to petitioner no retrial will be required by reason of any criticized exclusionary rule, and there is no danger that a person guilty of a crime will go free simply because a fine point of search and seizure law makes it impossible to convict him. This case goes to the substantive offense—the validity of an induction order. If the induction order is invalid, because it resulted from congressionally unauthorized delinquency status, then the crime of induction refusal has not been committed. Such was the result in *Fox,* and no less, it is respectfully submitted, should occur here.

In *Scogin* v. *United States,* 446 F.2d 416 (8th Cir. 1971), the Court of Appeals granted §2255 relief on the ground of this Court's decisions in *United States* v. *Covington,* 395

U.S. 57 (1969), and *Leary* v. *United States*, 395 U.S. 6 (1969), held retroactive in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). Relief was granted notwithstanding a strong argument of waiver urged by the government inasmuch as Scogin pleaded guilty and did not appeal from his conviction. The court rejected the Government's argument that "a voluntary guilty plea, made in the light of the law applicable at the time it was entered, does not become vulnerable to attack because later judicial decisions indicate that the choice to plead guilty rested on a faulty premise." 446 F.2d at 420. It is inconceivable that the Eighth Circuit would have ruled otherwise if Scogin had attempted to anticipate the *Covington-Leary-Coin & Currency* decisions, and had urged those arguments at trial and on appeal, but had lost nonetheless. In both situations a rationale which commends itself to the "ends of justice" objective of §2255 is that of Chief Judge Matthes in *Scogin*, 446 F.2d at 420:

> "... we are convinced that to allow one to continue to be penalized for conduct which is now constitutionally immune from punishment would contravene basic concepts of justice and fairness." [24]

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[24] The First Circuit has held in a closely related context:

> "To accord [the decision in question] other than fully retroactive effect would be to make what was not a crime for one registrant a crime under the same statute for another registrant. . . . Cf. United States v. United States Coin and Currency, 401 U.S. 715 (1971)."

United States v. *Fargnoli*, 458 F.2d 1237, 1238 (1st Cir. 1972). See also *United States* v. *Fargnoli*, 354 F. Supp. 987 (D.R.I. 1973); *United States* v. *Ramos*, 319 F. Supp. 1207 (D.R.I. 1970); *United States* v. *Kelly*, 314 F. Supp. 500 (E.D.N.Y. 1970).

II.

The decision below should be reversed and the judgment of conviction vacated, because petitioner's conviction for induction refusal, factually identical with that of appellant in *United States* v. *Fox*, 454 F.2d 593 (1973), was predicated on an invalid, delinquency-based induction order in conflict with the teaching of *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

All parties to this litigation agree that the decisions below are in direct conflict with the subsequent decisions of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593 (1971), and *Zack* v. *Benson*, 454 F.2d 596 (1971). The Solicitor General has twice conceded this. See Supplemental Memorandum for the United States in Davis v. United States, 71-661, Oct. T. 1971, p. 2, and Mem. in Opp., p. 2, to the instant petition. These decisions, in turn, are bottomed upon the decision of this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

In *Gutknecht* v. *United States*, *supra*, this Court held that the delinquency regulations, 32 C.F.R. Part 1642 (1969), were not authorized by Congress.[25] Consequently,

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[25] The Court wrote:

> "The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our lawmaking traditions. . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted." 396 U.S. at 306-307.

See also *Breen* v. *Selective Service Local Board*, 396 U.S. 460 (1970); *Oestereich* v. *Selective Service Board*, 393 U.S. 233 (1969); *Bucher* v. *Selective Service System, Local Boards No. 2 etc.*, 421 F.2d 24, 27-28 (3d Cir. 1970).

local boards were without power to order registrants to report for induction pursuant to those regulations. Petitioner was unarguably ordered to report for induction as a delinquent (A15, A16). He had been declared delinquent for failing to report for a physical examination (A14). Pursuant to 32 C.F.R. §1631.7(a) (1969), he was selected and ordered to report for induction notwithstanding that he had not taken a physical examination and thus (1) had not been found acceptable for service in the armed forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect (8a, A6).

The Selective Service System's delinquency regulations, 32 C.F.R., Part 1642 *supra*, at the time they came before this Court for review in *Gutknecht*, were given teeth through the priority induction provisions of 32 C.F.R. 1631.7(a) (1969). Indeed, the primary punitive sanction of the entire delinquency scheme, priority induction, was nowhere enunciated in Part 1642. Rather, 32 C.F.R. 1642.13 provided that delinquents were to be ordered "to report for induction in the manner provided in section 1631.7. . . ." Thus, this Court in *Gutknecht* reviewed *in extenso* the priority induction scheme provided for in Part 1642, and executed through 1631.7(a)(1), and flatly invalidated *the entire scheme*. See 396 U.S. at 298, n. 1, and accompanying text. Moreover, the government's assertion that *Gutknecht* "did not involve Section 1631.7(a)," p. 7, Memo. in Opp., in Davis v. United States, 71-661, Oct. T. 1971, is a disingenuous retreat from the previous admission set forth in the Government's brief at p. 136, n. 22, in *Gutknecht* v. *United States*, No. 71, Oct. T. 1969:

> "... 32 C.F.R. 1631.7. That regulation, providing for the priority induction of delinquents and volunteers ahead

> of all other registrants, *is in turn linked to 32 C.F.R. 1642.13,* which calls for the induction of delinquent registrants 'in the manner provided in section 1631.7. . . .'" (Emphasis added.)

Under regulations in force at the time petitioner was ordered for induction,[26] the only persons who could be ordered and inducted without first being given a pre-induction physical examination and statement of acceptability were three classes of registrants: conscientious objectors, volunteers, and delinquents. 32 C.F.R. §§1660.20(a); 1628.10 (1951); 1631.7(a) (1969); *United States* v. *Hayden,* 445 F.2d 1365, 1370 (9th Cir. 1971); *United States* v. *McClintock,* 311 F. Supp. 1119 (N.D. Cal. 1970). But, it is not the denial of this vital procedural right—the right to a full pre-induction physical examination, and a formal finding of acceptability—of which petitioner is most aggrieved. Rather, it is the violation of the underlying regulatory scheme which, while resulting in the denial of vital procedural safe-

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[26] 32 C.F.R. 1631.7(a) was amended by Executive Order No. 11537, F.R. 9991, of June 18, 1970, to provide that:

> ". . . notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such a case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." See 3 U.S. Code Cong. & Admin. News, 1970 at p. 6259.

guards,[27] more importantly did not permit the issuance to a registrant, such as petitioner, of any induction order at all.

But for his being declared delinquent, he could not, under then existing regulations, be lawfully ordered to report for induction. *United States* v. *Fox, supra,* 454 F.2d at 595; *United States* v. *Kohls,* 441 F.2d 1076, 1077 (9th Cir. 1971); *United States* v. *McClintock, supra,* 311 F. Supp. at 1121. Indeed, the Ninth Circuit has expressly held that the June 1970 amendment to 1631.7(a)[28] was created specif-

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[27] The government, in its petition for rehearing in *Fox* at p. 17, argued that the application of *Gutknecht* to cases such as *Davis* and *Fox* was improper because no prejudice accrued by virtue of the provisions of ¶3-18 of AR 601-270, SSLR 2246, which required that a complete physical examination be administered on the day of the delinquent's induction. Of course this is still prejudicial, because a registrant who has not been declared delinquent is entitled to both a pre-induction physical examination, 32 C.F.R. §§1628.10 *et seq.*, and a second physical examination on the day of induction pursuant to Army Regulations, see AR 601-270. But even in the absence of prejudice the government's position misreads the basis of the *Gutknecht* decision. In *Clay* v. *United States,* 403 U.S. 698 (1971), this Court recognized that the federal judiciary had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. Quoting its prior decision in *Sicurella* v. *United States,* 348 U.S. 385, 392 (1955), this Court stated that *"the integrity of the Selective Service System demands"* that an induction not be accomplished by illegal procedures. 403 U.S. at 704 (emphasis added). No less can be said for delinquency cases. See *Battiste* v. *United States,* 428 F.2d 801, 802 (5th Cir. 1970).

[28] It is interesting to note that the June, 1970, amendment to §1631.7, was accomplished solely by executive order and without any authorizing statutory amendment. *Contra, Gutknecht, supra,* 396 U.S. at 307; *Greene* v. *McElroy,* 360 U.S. 474 (1959). For a holding that the amendment itself operates as a punitive acceleration, see *United States* v. *Castillo,* —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973).

ically to deal with the implication that this Court's decision in *Gutknecht* invalidated the procedure therein authorized. *United States* v. *Ossa*, 470 F.2d 816, 818-819 (1972). See *United States* v. *Malone*, 336 F. Supp. 1324, 1329 (N.D. Cal. 1972).

The Ninth Circuit in *United States* v. *Fox, supra*, is not the only court of appeals which has adopted a *per se* rule that a declaration of delinquency for failure to appear at a physical examination contaminates an induction order based upon such delinquency. A similar rule was adopted in the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801, 812 (5th Cir. 1970). In *Battiste*, as in *Fox*, and as in the case of petitioner, the defendant was declared relinquent for failure to report for a physical examination, and was ordered to report for induction as a delinquent. On the appeal from Battiste's conviction for induction refusal, the government argued that the *Gutknecht* doctrine required no more than a remand to the district court for the purpose of determining whether Battiste's induction had been accelerated as a matter of fact. But the Fifth Circuit rejected this argument, and held that remand was unnecessary because even if the government proved that the induction order was not accelerated in fact:

> "... we would hold the induction order invalid. It is expressly based upon a regulation that the Supreme Court held illegal in *Gutknecht* and we cannot nullify the clear holding of that Court on the basis of isolated observations in the opinion." 428 F.2d at 802.[29]

[29] The clear language of the Fifth Circuit rule invalidating any induction order where it appears from the record "that the induction order was *expressly based upon* his delinquency status", see *United States* v. *Sellers*, 315 F. Supp. 1024, 1025 (N.D. Ga. 1970), should be a complete answer to the government's attempt to dis-

The priority induction regulatory scheme here in issue, authorizing as it did the induction of alleged delinquents without any lawfully valid statutory basis,[30] hardly comports with this Court's holding in *Gutknecht* that, in accordance with the language of Sec. 5(a)(1) of the Military Selective Service Act of 1967,[31] "the selection of persons for training and service shall be accomplished in an impartial manner", 396 U.S. at 304. For example, 32 C.F.R. §1642.4, at all times pertinent, described a Selective Service delinquent as one who has:

> "failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . ."

In *Gutknecht* v. *United States, supra,* the duty transgressed was the requirement that a registrant have in his personal possession a registration certificate and current classification notice. 32 C.F.R. §§1617.1; 1623.5. In *Fox,* and the instant case, the violation was identical to *Peet* v. *United States,* 399 U.S. 523 (1970), vacating 420 F.2d 549

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tinguish *Battiste* from this case on the facts, see Memo. in Opp., page 4, n. 2. In *United States* v. *Sellers, supra,* the district court, in ruling, on the authority of *Battiste,* that a delinquency declaration which preceded a prior induction order does not necessarily contaminate a second induction order, clearly recognizes the *per se* invalidation of any induction order "expressly based upon" delinquency status.

[30] 32 C.F.R. §§1642, 1631.7(a) and Local Board Memorandum (LBM) No. 14, ¶3.(c), at SSLR 2160, authorized and directed accelerated induction and removal from the normal order of call for registrants who have transgressed the regulatory requirement to submit to a physical examination.

[31] 50 U.S.C. App. §455(a)(1). This language was reenacted as part of the Selective Service Act of 1971. See 50 U.S.C. App. §455(a)(1) (1971).

(9th Cir. 1969), where the petitioner had been convicted of failing to report for induction as a delinquent—his delinquency status stemming from a prior failure to undergo a pre-induction physical examination in violation of 32 C.F.R. §1627. See also *United States* v. *Kohls, supra.*

Delinquency status, prior to the decision in *Gutknecht*, permitted, *inter alia*, three types of action to be taken by a local board which would hasten a registrant's induction. First, he could be reclassified from a deferred or exempt status into classification I-A (available for military service). 32 C.F.R. §1642.12. Second, a registrant in Class I-A, either classified properly, or as a result of a "punitive reclassification" under 1642.12, *supra*, could be "accelerated", i.e., inducted prior to all other registrants under the then prevailing regulatory scheme. See 32 C.F.R. §§1642.13; 1631.7; *Gutknecht, supra* at 298. The third possibility, is that 32 C.F.R. §1631.7, as then in effect, permitted the induction of a registrant who was delinquent and I-A,

> "notwithstanding the fact that he has not been found acceptable for service in the armed forces and has not been mailed a Statement of Acceptability (DD Form No. 62)." 32 C.F.R. §1631.7 (1963)."

Thus registrants declared delinquent such as Fox and petitioner Davis could be subjected to a third form of treatment which is no less in violation of the congressional mandate, relied upon by this Court, in *Gutknecht, supra*, that "selection of persons for training and service [be made] in an impartial manner." 50 U.S.C. App. §455(a)(1) 396 U.S. at 304.

As was Fox, petitioner was unarguably ordered to report for induction as a delinquent. He also had been declared delinquent for failing to report for a physical examination. Pursuant to 32 C.F.R. §1631.7(a), he also was selected and ordered to report for induction notwithstanding the fact that he had not taken a physical examination and thus (1) had not been found acceptable for service in the Armed Forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect. *But for his being declared delinquent, he could not have been ordered to report for induction* under then existing regulations without being found acceptable for service and without being mailed a Statement of Acceptability. Since the delinquency regulations have been declared unauthorized and constitutionally invalid, petitioner's induction order based solely upon his status as a delinquent must also be held to be invalid. *United States* v. *Fox, supra; Zack* v. *Benson, supra.*

The effect of this Court's holding in *Gutknecht*, as explicated by the decision in *Fox*, is clear: upon petitioner's failure to report for a physical examination, the only option open to the local board consistent with the mandate of the statute, prior to the amendment of §1631.7, was to report him to the United States Attorney for prosecution for that violation. *Fox, supra,* at 596. He could not be alternatively processed for induction. The order was consequently invalid and the indictment should have been dismissed on this ground.

Nowhere in the opinion below is there any intimation by the *Davis III* panel that petitioner's case, on its facts, does not come within the *Fox* and *Zack* rule. Rather, there is merely an unexplained refusal to apply *Fox* and *Zack* to *Davis*, "under circumstances such as here presented,"

472 F.2d at 596. These "circumstances," whatever they may be, have never been explained.

This *ipse dixit* is particularly unilluminating in view of the virtually uncontested line of cases, including the Ninth Circuit's own decisions in *Andre* v. *Resor*, 443 F.2d 921 (1971), affirming 313 F. Supp. 957 (N.D. Cal. 1970), and *Zack* v. *Benson, supra*, holding *Gutknecht* to be retroactive. See *United States* v. *Kelly*, 314 F. Supp. 500 (E.D. N.Y. 1970); *Foster* v. *United States*, 320 F. Supp. 646 (D. Conn. 1970); *United States* v. *Rumon*, 315 F. Supp. 1126 (W.D. Pa. 1970); *Swartz* v. *United States*, 3 SSLR 3424 (C.D. Cal. 1970); *Akeson* v. *United States*, 4 SSLR 3430 (D. Colo. 1970); *Kittrell* v. *United States*, 4 SSLR 3439 (N.D. Fla. 1971); *Mikesell* v. *United States*, 3 SSLR 3390 (W.D. Mich. 1970). See also *Bradley* v. *Laird*, 449 F.2d 898 (10th Cir. 1971); *Bruce* v. *United States*, 448 F.2d 21 (4th Cir. 1971). *Contra, United States* v. *Crocker*, 313 F. Supp. 831 (D. Minn. 1970); *Chandler* v. *United States*, 332 F. Supp. 397 (D. Md. 1971).[22]

In the first petition for certiorari, Oct. Term, 1971, 71-661, seeking review by this Court of the decision in *Davis II*, prior to the Ninth Circuit decision in *United States* v. *Fox, supra*, petitioner argued that *Davis II* was inconsistent with the decision of the Fifth Circuit in *Batiste* v. *United States, supra*, and was likewise inconsistent

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[22] The decision in *Chandler* is of questionable validity in light of the Fourth Circuit's subsequent decision in *Bruce, supra*, decided eight days later. Petitioner respectfully submits that there can be little question as to the retroactivity of this Court's decision in *Gutknecht*. See the excellent analysis of this question by Chief Judge Zavatt in *United States* v. *Kelly, supra*. See also, *Andre* v. *Resor, supra*. Petitioner respectfully submits that for the same reasons explicated by Chief Judge Zavatt in *Kelly*, *Fox* must also be held to be retroactive. See Point I, *supra*, pp. 32-35.

with the decision of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971). In *Battiste*, as we discussed *supra*, pp. 42-43, the Fifth Circuit, interpreting *Gutknecht*, established a *per se* rule of invalidation of any delinquency-based induction order, and factual determination of acceleration became irrelevant. Since the Ninth Circuit in *United States* v. *Fox* has now adopted a similar rule, it would seem unnecessary for this Court to rule on whether the decisions below are likewise in violation of the intermediate *Dobie* rule of the Fourth Circuit.

Nevertheless, petitioner submits that his conviction cannot stand under either the *Dobie* rule or the *Fox-Battiste* rule. In *Dobie*, the Fourth Circuit held that in the case of a delinquency induction acceleration is presumed and the government must sustain a heavy burden to disprove it. The Fourth Circuit expressly rejected opinion evidence of the local board clerk, and carefully outlined the objective documentary evidence which was necessary. Moreover, the Fourth Circuit ruled that the test was not whether *younger* men were called at the same time as or before defendant—the meaningless test utilized by the district court below (8a)—but whether *older* men were available and uncalled. 444 F.2d at 420-421.[33]

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[33] The Fourth Circuit held in *Dobie*:

"To disprove Dobie's acceleration, the government should have produced objective evidence of a more substantial nature than the opinion of the clerk. This is especially true when the records on their face indicate acceleration and the government has in its possession other documents which would have established whether he could have been called in the proper order." 444 F.2d at 421-422.

Accord: United States v. *Dudley*, 451 F.2d 1300, 1303-1304 (6th Cir. 1971) (correct test for acceleration in fact is whether "men older than Appellant were not called prior to Appellant").

That the *Dobie* rule, or indeed any rationale which places the government under a strict burden of proof in the event of a delinquency induction, would require the vacating of petitioner's conviction, is evident from the fact that the district court on remand after *Davis I* made a finding of no acceleration precisely on the erroneous theory, faulty reasoning, and insufficient evidence rejected by the Fourth Circuit in *Dobie*. See 2a-4a; A5-A7.[24]

[24] Since this case does not present a factual situation where a defendant could be acquitted only under the *Fox* rule, but would be convicted under the *Dobie* standard, there is no occasion for this Court to consider whether one standard is preferable to the other. Moreover, since petitioner should obviously be entitled to the benefit of the rule in his circuit, and since that is the *per se Fox* rule, we have omitted a more detailed and systematic analysis of the problems of proof and documentation presented in Selective Service litigation over acceleration in fact and order of call questions. See Petition for Certiorari in *Davis* v. *United States*, October T. 1971, 71-661 (*Davis II*), pages 11-16.

CONCLUSION

For all of the foregoing reasons the decision below should be reversed, the judgment of conviction should be vacated, and the indictment should be dismissed.

Respectfully submitted,

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